UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ANDREE C. SMITH, Plaintiff, v. PAUL H. O'NEILL, Secretary, United States Department of Treasury, Defendant.	Civil Action No. 99-00547 ESH/DAR

REPORT AND RECOMMENDATION

Defendant's Renewed Motion to Dismiss or, in the Alternative, to Compel Further Responses and Modify the May 8, 2001 Order (Docket No. 47) is pending for consideration by the undersigned United States Magistrate Judge.[1] Upon consideration of the motion, the memoranda in support thereof and in opposition thereto and the entire record herein, the undersigned finds that plaintiff has willfully failed to comply with the undersigned's order compelling discovery, and recommends that this action be dismissed as a sanction.

BACKGROUND

Plaintiff commenced this action as a pro se litigant by a complaint filed on March 3, 1999. By a 25-page amended complaint filed on December 23, 1999 by counsel appointed from the pro bono panel, plaintiff, a former employee of the Department of the Treasury, generally alleges race discrimination and retaliation in violation of Title VII of the Civil Rights Act of 1964, as amended,

[1] By an Order filed on May 8, 2001 (Docket No. 46), the undersigned denied defendant's motion to dismiss (Docket No. 43, Part 1) without prejudice, and granted defendant's motion to compel (Docket No. 43, Part 2).

42 U.S.C. § 2000e et seq. By a Memorandum and Order entered on June 22, 2000 (Docket No. 32), the Court (Huvelle, J.) denied defendant's motion to dismiss Count I of the Amended Complaint, but granted the motion to dismiss Count II. On July 10, 2000, both plaintiff and counsel appointed from the pro bono panel moved to withdraw counsel's appearance. Counsel's motion was granted by an Order filed on July 11, 2000 (Docket No. 36).

At a status hearing on November 3, 2000, the Court ordered that the parties exchange witness lists on January 2, 2001. Defendant's Motion to Dismiss or, in the Alternative, for Sanctions and to Compel Discovery Responses by and Deposition of Plaintiff ("Motion to Dismiss"), Ex. 5 (Tr. at 4, lines 18-24). Mindful that plaintiff was proceeding pro se, the Court explained the terms of the scheduling order in detail, including the standards governing the witness lists, answers to interrogatories, production of documents, and depositions.[2] During the course of the explanation, plaintiff interjected the following comment:

> MS. SMITH: The only thing that I have - - I'm going by the record, the evidence I already submitted to the defendant that they should already have. If they ask me for something in discovery they already have, refer to the file when it was submitted and given to them. I'm not going to give them the

[2] For example, the Court explained that the Assistant United States Attorney representing the defendant

> [is] entitled to have you now answer what are called interrogatories under oath. You fill out the answers. I don't can't care what your affidavit says. You got to start with filling out her answers to interrogatories and get them signed under oath.

Motion to Dismiss, Ex. 5 (Tr. at 46, lines 4-8).

same thing they already have.

THE COURT: I don't know what they have.

MS. SMITH: That's not my problem.

Motion to Dismiss, Ex. 5 (Tr. at 4, lines 9-16). In response to the concern of defendant's counsel regarding plaintiff's claim of emotional distress, plaintiff declared that "[m]y medical documentation was submitted to the defendants. I'm not going to submit it again." Motion to Dismiss, Ex. 5 (Tr. at 39, lines 7-9).

In the Scheduling Order entered on November 3, 2000 (Docket No. 38), the Court assigned this action to the complex track, and directed that discovery close on April 30, 2001 and dispositive motions be filed by June 30, 2001.

On April 4, 2001, defendant filed his Motion to Dismiss or, in the Alternative, for Sanctions and to Compel Discovery Responses by and Deposition of Plaintiff (Docket No. 43). In the memorandum in support of the motion, defendant maintained that "plaintiff has not fulfilled a single one of her obligations under [the Scheduling Order] and the rules of discovery other than to provide a list of 121 witnesses on January 9, 2001 - - one week late." Defendant's Memorandum in Support of Motion to Dismiss or, in the Alternative, for Sanctions and to Compel Discovery Responses by and Deposition of Plaintiff at 2. By an Order of Referral filed April 6, 2001 (Docket No. 44), that motion and all discovery disputes were referred to the undersigned United States Magistrate Judge. See April 6, 2001 Order of Referral at 2. The Court also ordered plaintiff to file her response to defendant's motion to dismiss or, in the alternative, for sanctions and to compel discovery, no later than April 30, 2001. Id. at 1.

Plaintiff filed her response (Docket No. 45) in accordance with the April 6 Order. In it,

she maintained that "I have already provided the necessary information to the [defendant's] interrogatories responses to allegations and documented evidence attached to all my affidavits." With respect to the deposition which she failed to attend, plaintiff stated that "[m]ost of my responses to Defendant were by telephone." [Plaintiff's Response] to Defendant's Motion to Dismiss or, in the Alternative for Sanctions and to Compel Discovery Responses by and Deposition of Plaintiff at 1.

Plaintiff and counsel for defendant appeared before the undersigned on May 8, 2001 for a hearing on defendant's motion. After consideration of the parties' oral arguments, as well as their written submissions, the undersigned granted defendant's motion to compel answers to interrogatories, production of documents and deposition testimony.[3] The clarity of the undersigned's Order notwithstanding, plaintiff persisted in her resistance to making discovery:

> MS. SMITH: I understand, I understand what you're saying , but I'm saying that if the Court hasn't reviewed the discovery materials as to assess what should be a part of this case and what shouldn't be a part of this case, why would you order me to give the attorney what she doesn't really need? It's not relevant to my case and that's what I'm saying, most of the information that she's asking for is not relevant to my case files or to my case. They're my privacy information I feel that they don't need to have, you know.
>
> And if she can show the relevance to it pertaining to the allegations at issue, I won't have a problem with that. But just because she wants something, you know, I have to provide it? Yes, I have a problem with that, you know. If she asks me for a list of what date my kids was born, I'm supposed to give her that? That has nothing to do with this case.

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[3] See n.1, supra.

May 8, 2001 Hearing (Tr. at 40, line 25 to 41, line 15).

The undersigned informed plaintiff that her relevance objections had been considered, but were overruled. See May 8, 2001 Hearing (Tr. at 18, lines 2-12; 41, lines 17-23; 45, lines 11-20). Additionally, the undersigned informed plaintiff, on at least five occasions, that her continued failure to comply with the Court's orders could be the basis of a finding that she willfully refused to engage in discovery, and that her case could be dismissed as a sanction. May 8, 2001 Hearing (Tr. at 18, lines 13-20; 40, lines 15-24; 42, lines 12-19; 45, line 21 to 46, line 15; 51, line 20 to 52, line 24).

On May 25, 2001, defendant filed Defendant's Renewed Motion to Dismiss or, in the Alternative, to Compel Further Responses and Modify the May 8, 2001 Order ("Defendant's Renewed Motion"). In it, defendant maintains that "[p]laintiff's discovery responses are wholly inadequate and insufficient under the rules." Defendant asserts that in plaintiff's answers to the interrogatories, she "repeated her incantation that everything is contained in the administrative files complied by the agency during its investigation of her administrative complaints of discrimination[,]" and that her response to the requests for production of documents "is similarly lacking." Defendant's Renewed Motion at 2-3. Defendant adds that "plaintiff failed to produce a signed request for a release for her medical records[,]" notwithstanding her claim for damages for a depressive condition allegedly caused by defendant. Id. at 3. Defendant argues that "[d]ismissal is warranted at this point because plaintiff has shown that lesser sanctions and the provision of additional time will be ineffective." Id.

Plaintiff, in her opposition, demonstrates continued resistance to the order compelling discovery. Plaintiff asserts that defendant "[does] not need a Deposition from me to state

allegations[,]" and asks that defendant "be limited to the case files created [b]y them and that no other information after the fact be allowed to justify their actions." [Plaintiff's Response] to Defendant's Renewed Motion to Dismiss or, in the Alternative, to Compel Further Response and Modify the May 8, 2001 Order (Docket No. 48) at 2. In a further response, plaintiff continues to object to the order requiring her to produce documents and appear for a deposition by defendant. See [Plaintiff's] Supplemental [Response] to Defendant's Renewed Motion to [Dismiss] or, in the Alternative, to Compel Further Responses and Modify the May 8, 2001 Order ("Plaintiff's Supplemental Response") (Docket No. 55) at 3-4.[4]

Defendant, in his reply, acknowledges that plaintiff appeared for her deposition, but that "[her] belligerent demeanor and persistent tirades and outbursts concerning what defendant's counsel should already know and what defendant did not have any business trying to find out thwarted completion of the deposition." Defendant's Reply in Support of Renewed Motion to Dismiss or, in the Alternative, to Compel Further Responses ("Defendant's Reply") (Docket No. 56) at 5. Among the passages of the deposition transcript on which defendant relies is one which occurred after plaintiff answered some background questions about one of her allegations:

> Q. What facts do you have to support your allegation that the selection was discriminatory?
>
> A. I'm not here to prove my case. I'm here only to state for the record what my allegations are.
>
> When it comes to the time for me to prove my case, I will state whatever facts I have available to you. At this point I'm not going to sit here and

[4] Plaintiff also claims that the videotapes and transcripts of her deposition, which defendant filed in accordance with the undersigned's order, "have been altered by now[.]" Plaintiff's Supplemental Response at 1.

> give you what my case strategy is to proceed in the U.S. District Court.
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> Now, if you want to ask me questions pertaining to my allegations, I will answer that. But I'm going to sit here and go through the entire file and let you nitpick me on what evidence I have to support what I'm saying, because that's all you're doing.

June 4, 2001 Video Deposition of Andree Smith (Tr. at 45, lines 4-16).

Defendant claims that the discovery which plaintiff has refused to provide "is critical for defendant to be able to prepare his defense to plaintiff's claim for significant damages." Defendant's Reply at 1. Defendant submits that "[b]ecause the Court has now exhausted all reasonable methods short of dismissal to address plaintiff's intransigence, and plaintiff has steadfastly resisted legitimate discovery and wasted multiple additional chances to comply with the Court's orders and the rules of procedure, this case should now be dismissed." Id. at 1.[5]

DISCUSSION

Applicable Standards

"Under FED. R. CIV. P. 37(b)(2)(C), a district court may sanction parties who fail to comply with its orders in a variety of ways, including dismissal of the lawsuit." Bass v. Jostens, Inc., 71 F.3d 237, 241 (6th Cir. 1995) (citing Bank One of Cleveland, N.A. v. Abbe, 916 F.2d 1067, 1073 (6th Cir. 1990)).[6] This Circuit has held that "dismissal is a severe sanction, and

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[5] Defendant also maintains that plaintiff "concealed responsive information" during her deposition. See Defendant's Reply at 6-7. The undersigned makes no finding herein with respect to this assertion.

[6] Rule 37 provides, in pertinent part, that

should be resorted to only to the extent 'necessary to induce future compliance and preserve the integrity of the system.'" Weisberg v. Webster, 749 F.2d 864, 869 (D.C. Cir. 1984) (citing Litton Sys., Inc. v. American Tel. & Tel. Co., 91 F.R.D. 574, 576 (S.D.N.Y. 1981), aff'd, 700 F.2d 785 (2d Cir. 1983)). This Circuit has further observed that

> "the district court has been delegated a good deal of discretion in making discovery orders and enforcing them with sanctions." In evaluating the exercise of that discretion, as the Supreme Court has stated in National Hockey League v. Metropolitan Hockey Club, "[t]he question, of course, is not whether this Court, or whether the Court of Appeals, would as an original matter have dismissed the action; it is whether the District Court abused its discretion in so doing."

Weisberg, 749 F.2d at 870 (footnotes and internal citations omitted).

This Circuit has relied upon National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639 (1976), and Societe International pour Participations Industrielles et Commerciales v. Rogers, 357 U.S. 197 (1958), for its evaluation of the standard governing the determination of what conduct justifies dismissal:

> Read together, National Hockey League and Societe Internationale require a minimum of "willfulness,

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> [i]f a party . . . fails to obey an order to provide . . . discovery, . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
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> * * *
>
> (c) An order . . . dismissing the action or proceeding or any part thereof[.]

FED. R. CIV. P. 37(b)(2)(C).

> bad faith, or [some] fault" to justify dismissal, although the clear import of Societe Internationale is that mere failure to respond to discovery is sufficient to justify less severe sanctions. Subsequent interpretations continue to require that dismissal under Rule 37 be based on willfulness or at least gross negligence.

Weisberg, 749 F.2d at 871 (footnotes and internal citations omitted); see Valentine v. Museum of Modern Art, 29 F.3d 47, 49-50 (2d Cir. 1994).

A failure to comply with the court's discovery orders is willful "whenever there is a conscious and intentional failure to comply with the court order[s]." Bass, 71 F.3d at 241. Put another way, "[n]oncompliance with discovery orders is considered willful when the court's orders have been clear, when the party has understood them, and when the party's non-compliance is not due to factors beyond the party's control." Baba v. Japan Travel Bureau Int'l, 165 F.R.D. 398, 402-03 (S.D.N.Y. 1996), aff'd, 111 F.3d 2 (2d Cir. 1997).

Dismissal of an action with prejudice may be ordered as a sanction even in an instance in which a plaintiff is proceeding pro se, "so long as a warning has been given that noncompliance can result in dismissal." Valentine, 29 F.3d at 50 (citations omitted); Baba, 165 F.R.D. at 403. While a finding of willfulness, bad faith or fault on the part of the plaintiff

> remains a prerequisite to imposition of the dismissal sanction, it is by no means the sole consideration relevant to the determination whether to dismiss the case.
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> * * *
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> Especially in cases of delay to the orderly progression of the litigation process, the fundamental concern of avoiding the squandering of scarce judicial resources (and the resources of other litigants) in an era of overcrowded dockets and untoward delays in getting cases decided is highly

> germane to whether a District Court should dismiss a case.

Founding Church of Scientology of Wash., D.C., Inc. v. Webster, 802 F.2d 1448, 1458 (D.C. Cir. 1986), cert. denied, 484 U.S. 871 (1987).

Thus, "[t]he central requirement of Rule 37 is that 'any sanction must be just,' which requires in cases involving severe sanctions that the district court consider whether lesser sanctions would be more appropriate for the particular violation." Bonds v. District of Columbia, 93 F.3d 801, 808 (D.C. Cir. 1996), reh'g denied, 105 F.3d 674 (D.C. Cir. 1996), cert. denied, 520 U.S. 1274 (1997) (internal citation omitted). Accordingly, this Circuit has held that "'dismissal is a sanction of last resort to be applied only after less dire alternatives have been explored without success' or would obviously prove futile." Bonds, 93 F.3d at 808 (quoting Shea v. Donohoe Constr. Co., 795 F.2d 1071, 1075 (D.C. Cir. 1986)); see Capitol Chem. Indus. v. Community Mgmt. Corp., No. CIV.A.86-2944, 1988 WL 93136, at *1 (D.D.C. Aug. 29, 1988), aff'd, 887 F.2d 332 (D.C. Cir. 1989) (sanction of dismissal "should be used as a last resort, when less drastic sanctions will not be equally effective.").

Findings

Plaintiff does not deny that she has repeatedly failed to comply with orders of this Court regarding the conduct of discovery, and, as a threshold matter, the undersigned so finds. The undersigned further finds that plaintiff's persistent non-compliance was willful. The undersigned finds that the orders were "clear"; that plaintiff acknowledged that she understood them; and that "her compliance was fully within her control." Baba, 165 F.R.D. at 403. Moreover, plaintiff was

warned in a manner which "became progressively more direct" that she "was courting dismissal." Id. Accordingly, "[t]he core of this dispute . . . was not a lack of understanding on [plaintiff's] part. It was the fact that she disagreed with [the] rulings." Id. As in Baba, plaintiff complied "only with orders with which she agreed." Id. at 404. For these reasons, the undersigned finds that plaintiff's persistent intransigence, even after repeated admonitions that her case could be dismissed as a sanction for noncompliance, compels the conclusion that her noncompliance was willful. See Valentine, 29 F.3d at 50; Baba, 165 F.R.D. at 404 (dismissal ordered as a Rule 37 sanction where plaintiff "disregarded the discovery orders . . . for more than a year" and "persisted in her behavior despite my repeated warnings that her actions could result in dismissal.").

The undersigned has considered whether a less onerous sanction would be effective, and finds that it would not. See Capitol Chem. Indus., 1988 WL 93136, at *1. Plaintiff "has been given ample opportunity" to comply; however, given her emphatically declared intention to provide only that discovery which she believes is relevant, "the Court [has] no reason to believe that granting plaintiff another chance to cooperate with defendant's discovery would serve any useful purpose." See Carvalho v. Reid, 193 F.R.D. 149, 152 (S.D.N.Y. 2000).

While plaintiff has provided some responses to defendant's written discovery requests, and answered some of the questions propounded at the deposition, she has done so selectively. The undersigned finds that defendant has thereby been severely hampered in his ability to prepare for trial. See Capitol Chem. Indus., 1988 WL 93136, at *1 (in determining the appropriate sanction, "the Court may consider the extent to which the other party's preparation for trial has been hampered."). Indeed, plaintiff unabashedly proclaimed her intent:

> At this point I'm not going to sit here and give you what my case strategy is to proceed in the U.S. District Court.
>
> Now, if you want to ask me questions pertaining to my allegations, I will answer that. But I'm not going to sit here and go through the entire file and let you nitpick me on what evidence I have to support what I'm saying, because that's all you're doing.

June 4, 2001 Video Deposition of Andree Smith (Tr. at 45, lines 9-16). To require defendant to proceed to trial where plaintiff's responses to defendant's discovery requests have largely been confined to adamant refusals to provide the information requested would make a mockery of the rules and orders governing discovery. See Mathews v. U.S. Shoe Corp., 176 F.R.D. 442, 445 (W.D.N.Y. 1997) ("defendant cannot defend against plaintiff's suit without obtaining some discovery to explore the relevant facts and precise nature of plaintiff's claims.").

Finally, the undersigned finds that there can be no doubt that the court "[has] issued sufficient warnings that noncompliance could result in dismissal." See Baba, 165 F.R.D. at 403. The record reflects that plaintiff was informed of the consequences of noncompliance by the undersigned on at least five occasions. Typical of the undersigned's admonitions was the following:

> I want to make certain that you understand that if you, nonetheless, refuse to answer the questions or interrogatories, produce the documents that the Government has requested, or appear for your deposition on these two dates, June 4th and June 7th, beginning no earlier than 9:30 and continuing no later than 5:30, that the Court could well determine that you have willfully failed to participate in discovery to follow an order of the Court regarding discovery, and that because of that, your case should be dismissed.

May 8, 2001 Hearing (Tr. at 45, line 21 to 46, line 5). Moreover, the undersigned afforded plaintiff an opportunity to reconsider her intention to provide defendant only with the discovery she deemed relevant:

> I am prepared for you, Ms. Smith, to reflect on what the Court has ordered and it may well be that you will change your mind regarding materials that you do have, documents that you have or answers that you have that you now say that you are not going to produce.
>
> In essence, what I'm doing is disregarding what you just said, [and] not acting on what you just said, because I suppose if I did, my determination right now would be that in order to avoid wasting everyone's time, your time and the Defendant's time, by setting these dates and by incurring the cost of a court reporter and perhaps on your part, making alternative child care arrangements for these dates, that I would just rule now that you do not intend to comply with the order.
>
> However, that is not what I am doing. I still intend to deny without prejudice the motion to dismiss as a discovery sanction and instead, to permit you an opportunity to produce the documents, answer the interrogatories and appear for your deposition and the further opportunity to make your discovery request known.

May 8, 2001 Hearing (Tr. at 51, line 20 to 52, line 18).

Plaintiff has remained defiant notwithstanding these admonitions. The undersigned therefore finds that "less dire alternatives" than dismissal "would obviously prove futile." Bonds, 93 F.3d at 808; see Carvalho 193 F.R.D. at 152 (dismissal as a Rule 37 sanction ordered where plaintiff's "uncooperative and dilatory conduct . . . gives the Court no reason to believe that granting plaintiff another chance to cooperate with defendant's discovery efforts would serve any useful purpose"); Mathews, 176 F.R.D. at 445 ("I also do not believe that some less severe

sanction would be useful here, since plaintiff appears to have little regard for any court orders.").

CONCLUSION

For the foregoing reasons, it is, this _____ day of August, 2001,

RECOMMENDED that Defendant's Renewed Motion to Dismiss (Docket No. 47, Part 1) be **GRANTED**.

DEBORAH A. ROBINSON
United States Magistrate Judge

Within ten days after being served a copy, any party may file written objections to this report and recommendation. The objections shall specifically identify the portions of the proposed findings and recommendations to which the objection is made and the basis for the objection. In the absence of timely objections, further review of issues decided by this report and recommendation may be deemed waived.